999.

SUPREME COURT OF THE UNITED STATES.

No. 58.

ARTHUR BRONSON, COMPLAINANT,

vs.

JOHN H. KINZIE AND AL.

CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR ILLINOIS.

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Pleas in the Circuit Court of the United States, for the district of Illinois, in chancery sitting, held at Springfield, in the district aforesaid, on Friday the tenth day of June, of the term of June of said Circuit Court, in the year of our Lord one thousand eight hundred and forty-two, and of our independence the 66th year.

Present: The honorable John McLean, presiding judge, the honorable Nath'l. Pope, judge.

ARTHUR BRONSON, bought
vs.
JOHN H. KINZIE and Juliette A. his wife, Edmund K. Bussing and John S. Bussing, the president, directors, and company of the State Bank of Illinois, Jay Hathway, Mary Ann Wolcott, Daniel S. Griswold, Caroline Dunham, and Alonzo Huntington. } In Chancery.

In this case, on the 27th day of March, A. D. 1841, the complainant filed his bill to foreclose a mortgage, of which the following is a true copy:

United States Circuit Court in and for district of Illinois, in chancery.

To the honorable the judges of the circuit court of the United States, in and for the district of Illinois, in chancery sitting:

Humbly complaining, shows unto your honors your orator, Arthur Bronson, who at the commencement of this suit was, and now is, a citizen of the State of New York, complainant, against John H. Kinzie and Juliette A. his wife, Edmund K. Bussing, and John S. Bussing, the president, directors, and company of the State Bank of Illinois, Jay Hathaway, Mary Ann Wolcott, Daniel S. Griswold, Caroline Dunham, Alonzo Huntington, defendants, who are, and were at the time of the commencement of this suit, citizens of the State of Illinois, shows unto your honor, that on or about the thirteenth day of July, in the year of our Lord one thousand eight hundred and thirty-eight, the said John H. Kinzie was seized, or pretended to be seized, in fee of the lands and premises hereinafter mentioned. And your orator further shows unto your honors, that on the thirteenth day of July, in the year of our Lord one thousand eight hundred and thirty-eight, at Chicago, in the county of Cook, in the State of Illinois, the said John H. Kinzie executed his certain bond in writing, obligatory, sealed with his seal, and thereby bound himself, his heirs, executors, and administrators, unto your orator, his executors, administrators, and assigns, in the penal sum of eight thousand dollars, gold or silver coin of the same standard as that by which the coins of the United States were then regulated by the

laws existing at the date thereof, with a certain condition there under written, that if the said John H. Kinzie should well and truly pay, or cause to be paid, unto your orator, his executors, administrators, and assigns, the sum of four thousand dollars on the first day of January, which would be in the year of our Lord one thousand eight hundred and forty-two, with interest for the same, to be computed from the first day of January ensuing the date thereof, at the rate of twelve per cent. per annum, which said interest should be paid semi-annually, viz: (to wit,) on the first day of January and July, in each and every year, in coin as aforesaid, according to six certain promissory notes given for said interest, bearing even date with the said writing obligatory, and the payment both of principal and interest were to be made at such place in the city of New York, as your orator should in writing from time to time appoint; and in default of such appointment, then in such case to the credit of your orator, his executors, administrators, or assigns, in the Phœnix Bank of said city, with a proviso there under written, whereby it was expressly agreed, and fully understood, that if default should be made in the payment of any of the said promissory notes which had been given for the interest on the principal sum above mentioned as aforesaid, or any part thereof, should remain due and unpaid for the space of thirty days after the same should become due, and payable according to the condition of the said bond, then and in that case, the principal sum above mentioned, together with all arrearages of interest, should at the option of your orator, his executors, administrators, or assigns, become thereupon due and payable, and might be demanded immediately thereafter, any thing in the said bond before expressed to the contrary notwithstanding, as by the said bond or obligation and the condition thereof, now remaining in the hands of your orator ready to be produced and proven, as this honorable court shall direct, may more fully and at large appear.

And your orator further shows unto your honors, that the said John H. Kinzie and Juliette his wife, in order to secure the payment of the said principal sum of money, with the interest in manner and form aforesaid, in and by their certain indenture of mortgage, bearing date the said thirteenth day of July, one thousand eight hundred and thirty-eight, wherein, after reciting the giving of the said bond or obligation herein before set forth, with the terms and conditions thereof, together with the said interest notes, the said indenture of mortgage witnessed, that he, the said John H. Kinzie and wife, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof; and also, for and in consideration of one dollar to him in hand paid by your orator, at and before the ensealing and delivery of the said indenture of mortgage, the receipt whereof is therein acknowledged, did grant, bargain, sell, alien, release, con-

vey, and confirm unto your orator, and to your orator's heirs and assigns forever, all the one-half equal undivided interest, or half part of all those two certain lots of land situate, lying and being in the city of Chicago aforesaid, known and distinguished on a map or survey of "Kinzie's addition to Chicago," on file in the office of the recorder, of Cook county aforesaid, as lots number five and six in block number six (6) in said addition; and also, the like equal undivided half interest or half part of the brick hotel thereon erected, and now standing on said premises, known as the Lake House, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also, all the estate, right, title, interest, dower, and right of dower, property possession, claim or demand whatsoever, either in law or in equity of the said John H. Kinzie and wife, of, in, and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold the above granted, bargained, and described premises, with the appurtenances unto your orator, his heirs and assigns, to his and their own proper use, benefit, and behoof, forever: Provided, always, and the said indenture of mortgage was upon this express condition, nevertheless, that if the said John H. Kinzie and wife, their heirs, executors, or administrators, should well and truly pay unto your orator, his executors, administrators, or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then and from thenceforth the said indenture of mortgage, and the estate thereby granted, should cease, determine, and be utterly null and void, any thing in said indenture before contained to the contrary notwithstanding.

And the said John H. Kinzie, for himself, his heirs, executors, and administrators, did covenant, grant, and agree, to and with your orator, his executors, administrators, and assigns, that he would *would* well and truly pay unto your orator, his executors, administrators, or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, according to the said condition. But if default should be made in the payment of the said sum of money above mentioned *mentioned*, or the interest that might grow due thereon, or any part thereof, that then, in such case, it should be lawful for your orator, or his representatives, to enter upon the mortgaged premises and sell the same at public auction, and as the attorney of the said John H. Kinzie and wife, for that purpose in and by said indenture fully authorized to make and deliver to the purchaser, or purchasers, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple; and, out of the moneys arising from such sale, to retain the principal and interest which should then be due on the said

bond or obligation, together with the costs and charges of said sale, rendering the overplus, if any, to the said Kinzie; which sale, so to be made, should forever be a perpetual bar, both in law and equity, against said Kinzie and wife, their heirs and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from, or under him or them, or either of them.

And the said John H. Kinzie, in and by said indenture, did further covenant and agree, to and with your orator, that during the continuance of the said indenture as a subsisting mortgage, and until the full payment of all the moneys thereby secured, he would cause the buildings upon the said premises to be properly insured against fire, in and by some incorporated Fire Insurance Company, in the State of New York or elsewhere, to be approved of by your orator, and in an amount reasonably sufficient to cover any such loss or damage, and pay the premium thereon, and renew the policy as soon and as often as the same should expire, and assign in due form and deliver the said policy and the certificate of renewal to your orator, as a further collateral security for the payment of the said moneys; and that if any default be made in effecting, renewing, assigning or delivering such policy or certificate, or in paying the premium, then, in that case, it should be lawful for your orator to effect such insurance or renewal, and pay such premium, and charge the same to the said John H. Kinzie; which premium or premiums, so to be paid by your orator, with interest thereon at the rate of twelve per centum per annum, payable semi-annually, should be deemed included in and secured by the said indenture of mortgage—as in and by the said indenture of mortgage, now remaining in the possession of your orator, ready to be produced and proven as this honorable court shall direct, reference being thereunto had, will more fully and at large appear.

And your orator further shows unto your honors, that afterwards, to wit, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and thirty-eight, the execution of the said indenture of mortgage was, in due form of law, acknowledged before Frederick A. Howe, then and now a justice of the peace, duly authorized to take the same, by the said John H. Kinzie and Juliette A. his wife, as appears by the certificate of acknowledgment endorsed on the said indenture of mortgage, and signed by the said Frederick A. Howe, as such justice, and to which your orator, for greater certainty, prays leave to refer, if necessary for him so to do.

And your orator further shows unto your honors, that the said indenture of mortgage was, on the sixteenth day of July, eighteen hundred and thirty-eight, filed in the office of the recorder for Cook county, for record, and duly recorded by Richard J. Hamilton, recorder of the county of Cook—as by the record thereof, now remaining in the said office, and the certificate thereof, endorsed on the said indenture of mortgage, and signed by the said Richard J.

Hamilton, recorder, &c., sufficiently appears, and to which your orator, for greater certainty, prays leave to refer, if necessary.

And your orator further shews unto your honors, that the said promissory notes so given for the payment of the interest money as aforesaid, were severally paid, up to the first day of January, one thousand eight hundred and thirty-nine.

And your orator further shows unto your honors, that the several promissory notes, so given as aforesaid for the semi-annual interest as aforesaid, and which became due on the first day of July, one thousand eight hundred and thirty-nine, and on the first day of January and July, one thousand eight hundred and forty, have not been paid, nor either of them, nor any part thereof, but the same have remained due and unpaid, from the days on which the same respectively became due until the present time, being a time much exceeding thirty days.

By means of which said several defaults in the payment of the said notes, the principal sum of four thousand dollars, together with all arrearages of interest, according to the condition of the said bond or obligation, and at the option of your orator, became due and payable, and could be, and was demanded forthwith, after the same so became due and payable.

And your orator further shows unto your honors, that default was made in the payment of the interest note which had been given, and was payable on the first day of January, one thousand eight hundred and forty-one, and that the same has remained due and unpaid for the space of thirty days and longer, after the same became due and payable, and the same still remains due and unpaid, no part thereof having been paid to your orator.

By means of which said premises, the principal sum mentioned in the said bond or obligation, together with all arrearages of interest, has, according to the condition of the said bond, become due and payable, and could be, and was immediately demanded; yet no part of the same has been paid.

And your orator shows unto your honors that, according to the condition of the said bond or obligation he is entitled to interest on the said notes respectively, from the days on which the same respectively became due, until the same shall be paid.

And your orator further shows unto your honors, that *that* the said Kinzie has not effected insurance on the buildings described in the said indenture of mortgage, and assigned the same according to the said indenture, and that in consequence of such default, your orator, in pursuance of the condition of said indenture of mortgage, did effect an insurance on said buildings, and paid the premium thereupon, and charged the same to said John H. Kinzie, which premium amounts to the sum of four hundred dollars on the first day of January last, which said sum, with interest at twelve per cent. per annum, your orator claims should be included in and secured by said mortgage.

And your orator shows to your honors, that the said principal, interest, and premium money before mentioned, still remain due and unpaid to your orator. By means of which said premises, the said indenture of mortgage, and the estate thereby granted and mortgaged, became absolute in your orator. And your orator shows to your honors, that the said John H. Kinzie, or his assigns, have at all times possessed and enjoyed the said mortgaged premises, with the appurtenances, and have at all times received, and still do receive, the rents, issues, and profits thereof; so that your orator is greatly delayed and injured in the receipt of his said moneys.

And your orator expressly charges, that the said mortgaged premises are a slender and scanty security for the moneys so as aforesaid due to your orator from the said John H. Kinzie; and your orator has often, or some person for him, applied to said Kinzie, and requested him to pay and discharge the said moneys so due to your orator as aforesaid; and your orator well hoped the said John H. Kinzie would have complied with such reasonable request of your orator, as in equity and good conscience he ought to have done.

And your orator further shows unto your honors, that Edmund K. Bussing, John K. Bussing, the president, directors, and company of the State Bank of Illinois, Jay Hathaway, Mary Ann Wolcott, Alonzo Huntington, Daniel S. Griswold, Caroline Dunham, have, or claim to have, some interest in the said mortgaged premises as judgment creditors, subsequent mortgagees, or subsequent purchasers. And now so it is, may it please your honors, that the said defendants, combining and confederating to and with divers other persons at present unknown to your orator, but whose names when discovered your orator prays may be inserted herein, with proper and apt words to charge them, have, to injure and aggrieve your orator in the premises, and to deprive him of his said moneys sometimes given out, and pretended that though your orator's estate in the premises may have become absolute at law, yet your orator cannot foreclose the same, or sell the same premises, and that the same will be subject to an equity of redemption, and on various pretexts keep your orator out of his said moneys, and retain the said mortgaged premises; all which is contrary to equity and good conscience, and tends to the manifest injury and oppression of your orator. In tender consideration whereof, and for as much as your orator has not a complete and safe remedy at and by the strict rules of the common law, nor can without the aid of this court foreclose the equity of redemption of said mortgaged premises, or safely sell the same. To the end therefore, that the said defendants and their confederates when discovered may, upon their respective corporal oaths, full, true, and perfect answer make, to all and singular, the said premises, as fully and particularly as if the same were here again repeated, and they thereto particularly interrogated; and that the said defendants may, respectively, discover and set forth, what interest, lien, or claim, they, or either of them, have in or to

the said mortgaged premises; and that the said John H. Kinzie may be decreed to pay to your orator the said moneys, including principal and interest due, and to grow due, and also the difference of exchange between the city of Chicago and the city of New-York, where said moneys are specifically made payable, together with all your orator's costs and charges, by a short day to be appointed by this honorable court; and that in default of such payments, the said defendants, and each of them, and all persons claiming under them, or either of them, may be foreclosed of and from all equity of redemption, and claim of, in, and to the said mortgaged premises, and every part and parcel thereof; and that all and singular, the said mortgaged premises, with the appurtenances, may be sold by the order and decree of this honorable court, and out of the moneys arising from such sale your orator may be fully paid; and that your orator may have such other and further relief in the premises, as to your honors shall seem meet, and shall be agreeable to equity and good conscience. May it please your honors, the premises considered, to grant unto your orator the process of summons, to be issued according to the practice of this court, summoning the said defendants to appear and answer hereto, and to stand to and abide by such order and decree in the premises as shall be agreeable to equity and good conscience, and to your honors shall seem meet. And your orator will ever pray, &c.

J. N. ARNOLD.
Solicitor.

At the June term of the circuit court for the district of Illinois the case was brought to hearing, and the following decree entered in the cause:

This day comes the complainant by his solicitor, and it appearing to the court that the said John H. Kinzie, Juliette A. Kinzie, Edmund K. Bussing, and John S. Bussing, Alonzo Huntington, the president, directors, and company of the State Bank of Illinois, and Jay Hathaway have, respectively, entered therein appearance waived the service of a *decree nisi*, and consented to a decree of foreclosure in this cause; and it appearing to the court that this bill was filed to foreclose a mortgage executed by said Kinzie, and the same having been referred to the master to compute the amount due, and he having reported the same to the sum of ($5,272) five thousand two hundred and seventy-two dollars, and the same having been confirmed by the court: It is therefore ordered, adjudged, and decreed, that the said Kinzie pay to the said complainant the sum of five thousand two hundred and seventy-two dollars, within thirty days from date hereof, with interest at rate of twelve per cent. per annum, and also five per cent. on the same, that being the difference of exchange between the city of Chicago and New York, where said moneys are specifically made payable; and that in default of such payment, or any part thereof, at the time and in the

manner above specified, the said Kinzie, and each of the above named defendants, and all persons claiming under them, or either, or any of them, be, and the same hereby are, forever debarred and foreclosed of and from all equity of redemption, claim, property, demand, or possession of, in, and to the said mortgaged premises, and every part and parcel thereof.

And it is further ordered, adjudged, and decreed, that in case of such default, that all and singular the said mortgaged premises be sold at public auction, to the highest bidder, by and under the direction of James H. Rees, a commissioner for that purpose hereby authorized and fully empowered, the said commissioner giving sixty days' notice of such by publishing the same for six weeks in a newspaper published in the county where said mortgaged premises are; the first publication shall be sixty days before the day of sale; which said mortgaged premises are described as follows, to wit: all the one-half equal undivided interest or half part of all those two certain lots of land situate, lying, and being in the city of Chicago aforesaid, known and distinguished on a map or survey of "Kinzie's addition to Chicago," on file in the office of the recorder of Cook county aforesaid, as lots number five and six, in block six (6,) in said addition; and also the like equal undivided half interest or half part of the brick hotel thereon erected, and now standing, on said premises, known as the Lake House; and that said commissioner make to the purchaser or purchasers a deed of said premises; and that out of the moneys arising from said sale, he first pay the costs of this suit, and of said sale, and that he then pay to the complainant the said sum of five thousand two hundred and seventy-two dollars and seventy-six cents, and interest thereon, at twelve per cent., from date hereof to day of sale, and that he bring the residue of said moneys, if any, into court; and it is further considered, that unless the said Daniel S. Griswold and Caroline Dunham redeem said premises by the first day of next term of this court, their equity of redemption, and that of all persons claiming under them, or either of them, will be foreclosed, and this cause continued to next term of this court.

At the same term, on the 19th day of June, the circuit court adopted the following rules:

Ordered, that "when the marshal shall levy an execution upon real estate he shall have it appraised and sold under the provisions of the law of this State, entitled 'An act regulating the sale of property,' approved 27th February, 1841, if the case come within the provisions of that law; and any two of the three householders selected under the law agreeing, may make the valuation of the premises required.

"Before the sale of any real estate, on execution, the marshal shall give notice thirty days, in a newspaper published in the county where the land lies; and if there be no paper published in the county, then notice shall be given, thirty days before the sale, by

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notices as the statute requires. The court adopt the 8th section of the act of this State, to amend the act concerning judgments, &c. passed 19th February, 1841, which regulates the sale of mortgaged premises, &c. except where special direction shall be given in the decree of sale.

The following is the 8th section of the act above referred to, approved February 19th, 1841, entitled "An act to amend 'an act concerning judgments and executions, approved January 17th, 1825:'"

Sec. 8. In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity, for the sale of mortgaged lands, it shall be lawful for the mortgager of such lands, his heirs, executors, administrators, or grantors, to redeem the same in the manner now allowed by law for the redemption of lands sold by virtue of executions issued upon judgments at common law, and judgment creditors may redeem lands sold under any such decree, in the same manner as is prescribed for the redemption of lands in like manner sold upon executions issued upon judgments at common law. Nothing in this act contained shall be so construed as to deprive any person of the lien upon any land which he may have acquired, or may hereafter acquire, by virtue of the provisions of the act to which this is an amendment; and so much of the provisions of said act as are repugnant to the provisions of this act are hereby repealed. This act is to take effect from and after the first day of June next.

The following is the act above referred to, approved 27th February, 1841, entitled "An act regulating the sale of property:"

An act regulating the sale of property.

Sec. 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That when any execution shall be issued out of any of the courts of this State, whether of record or not, and shall be levied on any real or personal property, or both, it shall be the duty of the officer levying such execution to summon three householders of the proper county, one of whom shall be chosen by such officer, one by the plaintiff, and one by the defendant; in the execution, or in default of the parties making such choice, the officer shall choose for them; which householders, after being duly sworn by such officer so to do, shall fairly and impartially value the property upon which such execution is levied, having reference to its cash value; and they shall endorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them; and when such property shall be offered for sale, it shall not be struck off unless two-thirds of the amount of such valuation shall be bid therefor: Provided always, that the plaintiff, in any execution issued from any court of record of this State, may elect on what property he will have the same levied, except the land on which the defendant resides, and his personal property, which shall be last taken

in execution. And in all other executions, issued from any of the courts of this State, not being courts of record, the plaintiff in execution may elect on what personal property he will have the same levied, excepting and reserving, however, to the defendant in execution, in all cases, such an amount and quantity of property as is now exempt from execution by the laws of this State: And provided further, that all sales of mortgaged property shall be made according to the provisions of this act, whether the foreclosure of said mortgage be by judgment at law or decree in chancery. The provisions of this act shall extend to all judgments rendered prior to the first day of May, eighteen hundred and forty-one, and to all judgments that may be rendered on any contract, or cause of action, accruing prior to the first day of May, eighteen hundred and forty-one, and not to any other judgments than as before specified.

SEC. 2. When any property shall be levied on, and appraised in the manner required by this act, and the same shall be susceptible of a division, no greater quantity thereof than will be sufficient to pay the amount of the execution or executions thereon levied, together with the proper costs, at two-thirds of the valuation thereof, shall be offered for sale by the officer in whose hands such execution or executions may have been placed for collection.

SEC. 3. This act shall be in force from and after its passage; and the Secretary of State is hereby required to have a thousand copies thereof printed, immediately after its approval, and transmit them to the clerks of the county commissioners' courts, of the several counties in this State, for distribution among the proper officers thereof.

Approved, February, 27, 1841.

At the December term of said court, A. D. 1841, the defendant, John H. Kinzie, moved the court to set aside and vacate the above recited decree, or to so modify the same as to direct the sale of the mortgaged premises in pursuance of the rules above recited, and the 8th section of the act of Illinois, to amend the act concerning judgments, &c., passed 19th February, 1841, which regulates the sale of mortgaged premises, &c.

The decree was vacated. And at this term of the said court, the complainant moved the court for a final decree of strict foreclosure of said mortgage, or that the mortgaged premises should be sold to the highest bidder, without being subject to said rule and the act referred to. This motion was resisted on part of defendants, who moved that the decree should direct the sale according to said rule and act.

And the judges being opposed in opinion on the following points, to wit:

1st. Whether the decree in this case should be so entered as to direct the sale of the said mortgaged premises according to the said statute of the State of Illinois abovementioned; or whether the

same premises should be sold at public auction, to the highest bidder, without regard to the said law.

2d. Whether the decree in this case shall or shall not direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid, according to the said act of the State of Illinois.

3d. Whether the terms of the mortgage in this case do or do not require it to be excepted from the operation of the rule above recited. On motion of the complainant, it is ordered and directed that this cause, with said points, be certified to the Supreme Court, in pursuance of the act of Congress, and this cause is continued to the next term of this court.

I, James F. Owings, clerk of the Circuit Court of the United States for the district of Illinois, do certify that the foregoing is a true and correct copy of the papers filed, and proceedings had, in the above entitled cause, of Arthur Bronson against John H. Kinzie, and Juliette A. his wife, Edmund K. Bussing, and John S. Bussing, the president, directors, and company of the State Bank of Illinois, Jay Hathway, Mary Ann Wolcott, Daniel S. Griswold, Caroline Dunham, and Alonzo Huntington, in chancery, as far as the same were required by the court and parties to the suit, to be copied and certified to the Supreme Court of the United States.

In witness whereof, I have hereunto affixed the seal of said circuit court, and subscribed my name, this 5th day of July, [L. s.] A. D. 1842, and of our independence the sixty-seventh year.

JAMES F. OWINGS,
Clerk of said Circuit Court.

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SUPREME COURT OF THE UNITED STATES.

No. 73.

JOEL COLLINS, A PETITIONER IN BANKRUPTCY,

vs.

JAMES BLYTHE, AN OPPOSING CREDITOR.

ON A CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT U. S. FOR KENTUCKY.

Proceeding before John Catron and Thomas B. Monroe, of the 8th Circuit Court of the United States of America in and for the Kentucky district, holden at the capitol, in Frankfort, at the November term, 1842.

Joel Collins's case in Bankruptcy.

This statement which follows, of the question and points of law which arose in this case in the District Court of the United States for the district of Kentucky, in bankruptcy, and adjournment thereof into the court for decision, was filed.

"Joel Collins was declared a bankrupt by the decree of this court, on his own original petition for the benefit of the act of Congress, without opposition; but this, his petition for the discharge from his debts, and the certificate, was opposed by James Blythe, a creditor named by the petitioner on his original list of creditors, and who had proved his debt on grounds filed; of which, these are the substance and effect:

1. The petitioner did, subsequent to the day of January, 1841, in contemplation of bankruptcy, "by a deed of mortgage of his property and choses in action," to Thomas Palmer and Jesse Embray, give and secure a preference to them over his other creditors.

2. The petitioner did, in contemplation of bankruptcy, pay debts he owed to a portion of his creditors, and, by assignment and otherwise, give and secure to others a preference over his general creditors.

3. He fraudulently omitted to state on his inventory, and has suppressed, concealed, and withheld from the assignee a part of his property, rights, and effects.

J. & G. S. Gideon, printers.

On the hearing of this petition, and the opposition to the discharge, this case appeared.

The list of the creditors of the bankrupt, constituting part of his original petition for the benefit of the act, showed that he was indebted, jointly with William P. Hyronimus, a former partner with him in trade, to about one hundred and sixty or seventy persons, in various sums, amounting in all to about eight thousand dollars, due principally in the year 1840; and that he was indebted, in his own separate engagements, to about twenty-five or thirty persons in about twelve hundred dollars, principally due in the same year.

On the list of partnership debts of petitioner and Hyronimus is found two debts to James Blythe, the creditor now opposing his discharge—one for $500, due in October, 1840, and the other for $3,500, in December of that year. On both of which judgments were recovered in the succeeding June. And these are the debts proved by Blythe against the bankrupt estate.

The original inventory of the petitioner's separate property, and rights of property, showed:

1. One horse and five head of cattle - - -	$75 00
2. Household furniture - - - -	30 00
3. Farming utensils, worth - - -	5 00
	$110 00
4. Bad debts, or claims on insolvent persons for which he has no security - - - - -	$6,000 00

There were no partnership effects of the bankrupt and his partner Hyronimus.

The assignee designated and set apart to the bankrupt his separate property in possession. Nothing then was left for the creditors, either partnership or separate, except what might possibly be made out of the claims upon the insolvent debtors of the bankrupt; and this was all that was showed by the record of the proceedings in the bankruptcy. But

The opposing creditor exhibited the deed of mortgage which follows, executed by the bankrupt, and acknowledged and duly registered in the proper office on the 1st day of February, 1841:

"This indenture, made and entered into this 1st day of February, 1841, between Joel Collins, of the one part, and Thomas Palmer and Jesse Embray, of the other part, witnesseth: That the said Collins, in consideration of one dollar, and of the matter hereinafter set forth, doth hereby grant, bargain, sell, and convey to the said Embray and Palmer the following property, to wit: two hundred and sixty acres of land on which the said Collins , on the waters of Silver Creek, in Madison county; also five slaves, named Willis, Matilda, Thomas, James, and Sarah; all my stock of every description, consisting of horses, cattle, and hogs; and all

my implements of husbandry, and household and kitchen furniture; and all other property or choses in action owned by me: to have and to hold to the said Palmer and Embray, and their heirs and assigns, forever."

The above is subject to this condition: That if the said Collins shall well and truly pay off and discharge the following named debts, and save his securities and others harmless from the same, or the loss of the same, then the above is to be void, to wit, about the sum of about two thousand eight hundred dollars to Daniel Maupin, which Palmer and Gentry stands bound for, as my securities; also about one thousand and ten dollars to T. Burnam, for which they are my security; about two hundred and eighty dollars to J. B. Walker & Co., for which Embray is my security; about five hundred dollars to Benjamin Boggs, for which Palmer is my security; about five hundred dollars to R. Cochran, for which James Blythe is my security; about two thousand four hundred dollars, the amount of a bill of exchange sold to the Richmond Branch of the Northern Bank, and for which Thomas Palmer and Kerling Wood are my securities; about two hundred and fifty dollars to John Cornelison, and for which Palmer is my security; about four hundred and fifty dollars to Joel Collins, senr.; about two hundred and fifty dollars to E. R. McCrerry, and for which Palmer is my security; about six hundred dollars to James Embray, and for which Palmer is my security; and about two hundred and ten dollars to Richard Spurr, for which Palmer is my security. Now, when the debts aforesaid are all paid by Collins, with all interest and costs, the above is to be void.

These debts provided for by this mortgage are not the same stated on the list of creditors, but other and different debts, not therein mentioned on these documents; and there was no other evidence. The only supposition reconcilable with the affidavit of the petitioner to his original petition, that his inventory and list of creditors was complete—viz: that the creditors mentioned in the mortgage had been fully paid, and that the mortgage property is possession and action had been all appropriated, except what is found in the inventory, for that purpose, or otherwise disposed of, so that the petitioner had no longer any right therein, and that supposition was therefore adopted.

This exonerated the bankrupt from the objection made to his discharge—that he had not given a full inventory of all his property, but had withheld a part which he would otherwise have encountered.

A mortgagor has a right in his mortgaged effects, which ought to be stated on his inventory, whatever may be the relative value of the effects and amount of the debts secured.

The case, then, depended upon the first and second causes of opposition stated by the opposing creditor; and thereupon this question arose:

Does the fact of the making of this mortgage on the first of February, 1841, by the petitioner, afterwards declared a bankrupt, on his own voluntary application for the benefit of the act, of all his effects to some of his security to secure the payment of a portion of his debts, or the application of the effects so conveyed in mortgage to the satisfaction of his debts therein provided for, before or after the passage of the act, show a case of preference to the portion of his creditors or securities therein mentioned over his other creditors, within the second sentence of the second section of the statute, in the absence of all evidence that the deed was executed voluntarily, for the purpose of giving *the* preference, and not on the application of the other parties thereto, with or without a threat on their part of legal proceedings in case of his refusal, and without evidence that such preference was given or secured in contemplation of the passage of a bankrupt law; and that the petitioner, or his affairs, would be subjects thereof and thereby, or, according to any other part of the act, constitute a bar to his discharge from his debts, "*unless* the same be assented to by a majority in interest of those of his creditors who have not been so preferred?"

The above question, and the several points of law therein continued, are adjourned into the Circuit Court of the United States for the district of Kentucky, to be there heard and determined.

MONROE.

Whereupon, on consideration here of said question and points of law so stated and adjourned from the district court, the judges of this court are divided and opposed in opinion upon the question and points of law.

Whereupon, on the request of William Ousely, counsel for the said Collins, the statement thereof above was made, and is certified to the Supreme Court of the United States for final decision.

UNITED STATES OF AMERICA,
8th Circuit Kentucky District, sct.

I, John H. Hanna, clerk of the 8th Circuit Court of the United States, in and for the Kentucky district, do hereby certify that the foregoing pages contain a full, true, and complete transcript of the proceedings in the case aforesaid.

In testimony whereof, I have hereunto subscribed my [L. S.] name and affixed the seal of said court, this 7th day of December, A. D. 1842.

JOHN H. HANNA.

Filed 24th December, 1842.

SUPREME COURT OF THE UNITED STATES.

No. 74.

WILLIAM NELSON, a petitioner in bankruptcy,
vs.
DANIEL CARLAND, an opposing creditor.

ON A CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT, U. S., FOR THE KENTUCKY DISTRICT.

UNITED STATES OF AMERICA,
Eighth Circuit, Kentucky district, sct:

Pleas before the Hon. John Catron and Thomas B. Munroe, judges of the eighth circuit court of the United States of America, held in and for the district of Kentucky, at the Capital, in the town of Frankfort, at the November term, 1842.

November 24, 1842.

William Nelson's case in Bankruptcy.

This statement which follows, of questions and points of law, which arose in this case in the district court of the United States for the Kentucky district court in bankruptcy, and adjournment thereof into this court for decision, was filed.

William Nelson was declared a bankrupt here, on his own original petition for the benefit of the bankrupt law, without opposition; but this petition for his discharge from his debts was opposed by Daniel Carland, a creditor, who had proved his debt; and upon the hearing these questions, arose:

1st. Are the provisions of the act of Congress, to establish an uniform system of bankruptcy, of August, 1841, which authorizes the courts to declare any persons resident in the United States, irrespective of his occupation, owing debts as therein mentioned, on his own petition, in the mode there prescribed, a bankrupt; and to, thereafter, upon the proceedings, and on conditions therein prescribed, adjudge and decree him fully discharged of all his debts, and award him a certificate thereof, without the concurrence of all or some portion of his creditors, constitutional and valid enactments; or are said provisions of the statute, or any of them, in contravention of the Constitution of the United States, or without its authority, and void?

2d. Is an assignment by the bankrupt of his property, or rights

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of property, with intent to defraud his creditors, made before the passage of this act, or his contemplation or expectation of such a law, to persons now holding such effects, not for his use, but adversely to him, on the ground of the validity of the transaction as between the parties to it, and against the creditors by the concealment and denial of the fact of the vice, an act of fraud within the fourth section of the statute; or does it, within that section, or any other part of the act, constitute a bar to his discharge from his debts?

3d. Does the denial of the bankrupt, on his examination of the facts of the fraud of such transactions described in the above question, but which are found by the court on the testimony of witnesses and the documents, constitute a bar to the discharge?

4th. If the bankrupt had, before the passage of the statute, or his expectation of such a law, made assignments, conveyancy, or investments of his property or means, for the benefit of his family whilst he was insolvent, does his right to his discharge and certificate depend upon his prompt and full discovery upon his examination of all such transactions, with the particulars thereof, so that his creditors may have the full benefit of all such discovered effects?

These foregoing questions, with the several points of law therein, are adjourned into the circuit court of the United States for this district, to be there heard and determined.

MONROE.

Thereupon, on consideration hereof, said questions and points of law so stated, and adjourned from the district court, the judges of this court are divided and opposed in opinion upon each of said questions. Whereupon, on the request of the counsel of the said Carland, the opposing creditor, the statement thereof above was made, and is certified to the Supreme Court of the United States for final decision.

UNITED STATES OF AMERICA,
Eighth Circuit, Kentucky district, sct:

I, John H. Hanna, clerk of the eighth circuit court of the United States, in and for the Kentucky district, do hereby certify, that the foregoing pages contain a full, true, and complete [copy] of the proceedings in the case aforesaid.

In testimony whereof, I have hereunto subscribed my name, and [L. S.] affixed the seal of said court, this 2d day of December, 1842.

JNO. H. HANNA.

Filed 24th December, 1842.

1008.

SUPREME COURT OF THE UNITED STATES.

No. 75.

CHARLES W. CASTLEMAN, A PETITIONER IN BANKRUPTCY.

ON A CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT U. S. FOR THE KENTUCKY DISTRICT.

UNITED STATES OF AMERICA, } *sct.*
8th Circuit Kentucky District. }

Pleas before the honorable John Catron and Thomas B. Monroe, judges of the eighth circuit court of the United States of America, holden in and for the district of Kentucky, at the capitol in the town of Frankfort, at the November term, 1842:

NOVEMBER 24th, 1842.

Charles W. Castleman's case in bankruptcy.

This statement which follows, of questions and points of law, which arose in this case in the district court of the United States for the Kentucky district, in bankruptcy, and adjournment thereof unto this court for decision, was filed.

This is the original petition of Charles W. Castleman for the benefit of the bankrupt law, asking the court for this purpose to declare that he is a bankrupt; on which it appears that he owes, among other debts, one debt which is supposed by the court, on the facts therein stated, was created in consequence of his defalcation as executor, and, upon the hearing thereof, these questions have arisen:

1. Does the statute, in its description of debtors to whom it gives the right to apply to the court by their own original petitions for the benefit of the act, include a person owing "Any debt which shall [have] been created in consequence of a defalcation as an executor," and authorise the court to declare that he is a bankrupt for this or any other purpose? If not,

2d. Is not a debt, owing by the petitioner to a judgment creditor of his intestate, with which he is personally charged, in consequence of his having misapplied the assets in his hands as executor, to the payment of debts against his intestate of inferior grade, with notice of such judgment which had the priority of payment,

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a debt created in consequence of the defalcation as executor, within the meaning of the act of Congress?

3d. Is not a debt, owing by the petitioner to his sureties in his bond as executor, in consequence of their having satisfied a judgment against them, recovered on their bond in consequence of his misappropriation of the assets, as stated in the second question, or otherwise, a debt created in consequence of such defalcation, within the statute?

These questions above stated, and the several points of law therein contained, are adjourned in the circuit court of the United States for this district, to be there heard and determined.

MONROE.

Thereupon, on the consideration here of said questions and points of law so stated, and adjourned from the district court, the judges of this court were divided and opposed in opinion, upon each of said questions and points of law.

Whereupon, on the request of the counsel of the petitioner, the statement thereof above was made, and is certified to the Supreme Court of the United States for final decision.

UNITED STATES OF AMERICA,
8th Circuit Court, Kentucky District. } *sct.*

I, John H. Hanna, clerk of the eighth circuit court of the United States of America in and for the Kentucky district, do hereby certify, that the foregoing pages contain a full, true, and complete transcript of the proceedings in the case aforesaid.

In testimony whereof, I have hereunto subscribed my [L. S.] name, and affixed the seal of said court, this 1st day of December, A. D. 1842.

JOHN H. HANNA.

Filed December 24th, 1842.